

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

REPORT AND RECOMMENDATION

On June 2, 2017, Brian Capers (Plaintiff), a state prisoner appearing pro se, brought this action seeking relief under 42 U.S.C. § 1983. Doc. 1.¹ United States District Judge David L. Russell has referred the matter to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). Doc. 3.

The undersigned advised Plaintiff that his action could not proceed until either he paid the \$400 filing fee or the court granted him leave to proceed in forma pauperis (IFP). Doc. 4. The undersigned ordered Plaintiff to cure this deficiency by a date certain, and warned that his failure to do so could result in the dismissal of this action. *Id.*

¹ Citations to a court document are to its electronic case filing designation and pagination.

Plaintiff then timely filed a supported motion seeking leave to proceed IFP, Doc. 5, and the undersigned entered an order consistent with 28 U.S.C. § 1915(b)(1), granting the motion and directing Plaintiff to pay an initial partial filing fee of \$18.21 on or before July 30, 2017. Doc. 6. The undersigned advised Plaintiff “that unless by the date specified . . . he has either (1) paid the initial partial filing fee, or (2) shown cause in writing for the failure to pay, this action will be subject to dismissal without prejudice to refiling, and no fees or costs will be imposed or collected.” Doc. 6, at 1-2. Plaintiff did not respond, and the undersigned *sua sponte* extended the deadline until August 23, 2017, cautioning that “[i]f Plaintiff fails to comply, the court will recommend dismissal of this action without prejudice and without further notice.” Doc. 7. Once again, Plaintiff did not respond. Both orders, Docs. 6, 7, were sent to the last address Plaintiff provided to the court, *see* Doc. 5, and neither has been returned to the court as undeliverable. Under this Court’s local rules (LCvR), the orders are “deemed delivered.” LCvR 5.4(a).²

Plaintiff failed to pay the initial filing fee as ordered and he has not shown—or made any attempt to show—cause for nonpayment, and dismissal of his action without prejudice to refiling is warranted under Fed. R. Civ. P. 41(b). *See Hill v. Fort Leavenworth Disciplinary Barracks*, 660 F. App’x 623,

² The court’s docket sheet shows that on June 5, 2017, the Clerk of Court notified Plaintiff of his obligation to notify the court of any change of address.

625 (10th Cir. 2016) (holding the district court did not abuse its discretion in dismissing an action without prejudice when, “[d]espite warnings from the district court, [Plaintiff] failed to pay the statutorily mandated filing fee and failed to otherwise establish his inability to pay”).

Recommendation and Notice of Right to Object

For the stated reasons, the undersigned recommends the dismissal of Plaintiff's action under Fed. R. Civ. P. 41(b), without prejudice to refiling.

The undersigned advises Plaintiff of his right to file an objection to this Report and Recommendation with the Clerk of Court on or before September 25, 2017, under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). The undersigned further advises Plaintiff that failure to file a timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation disposes of all issues and terminates the referral to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 5th day of September, 2017.



SUZANNE MITCHELL
UNITED STATES MAGISTRATE JUDGE